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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, AND JULIEN A.M. STARR,

Plaintiffs-Appellees,

v.

STUDENT ASSOCIATION OF THE STATE OF NEW YORK AT ALBANY*,

Defendants-Appellants.

No. 07-0891

Argued: December 22, 2008.
Decided: July 1, 2010

Before: NEWMAN, CALABRESI, and SACK, Circuit Judges. Judge Calabresi concurs in a separate opinion

PER CURIAM:

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* The State University of New York at Albany, named as a defendant in the Verified Complaint, was voluntarily dismissed while this case was pending in the district court.

Defendant Student Association (the "SA") of the State University of New York at Albany ("SUNY-Albany") appeals from a decision of the United States District Court for the Northern District of New York granting summary judgment in favor of plaintiffs College Standard Magazine ("CSM"), a campus organization that publishes a politically conservative newspaper, and its founders, Jeffrey Barea and Julien Starr, on their challenge under the First Amendment to a policy pursuant to which the SA distributed funds comprising the proceeds of a mandatory student activity fee to student groups. The district court concluded that the policy was facially unconstitutional because it vested in the SA "unbridled discretion" to decide how to distribute the funds, thereby presenting an impermissible risk of viewpoint discrimination, and because unwritten guidelines allegedly employed by the SA in making funding decisions improperly implicated the viewpoint of putative recipients.

The plaintiffs were denied funding under the challenged policy in February of 2003. They initially challenged the policy both facially and as-applied. After the district court ruled in their favor on the facial challenge, the plaintiffs stipulated to the entry of summary judgment against them on the as-applied challenge from which they cannot and have not appealed. Thus the plaintiffs have conceded, for present purposes, that they suffered no harm from the denial of funding to their organization under the challenged policy.

This appeal therefore concerns only the plaintiffs' facial challenge to the policy. But the funding policy challenged by the plaintiffs is no longer in place at

SUNY-Albany. The SA amended its constitution in the Spring of 2003 to include regulations on funding that explicitly require viewpoint neutrality. The plaintiffs have made clear that this lawsuit does not challenge the new funding policy, and there is no indication that the former, challenged funding policy will be reinstated.

We are thus asked to consider the constitutionality of a funding policy that is no longer in effect, and that is not alleged to have caused the plaintiffs harm when it was in effect. This we cannot do. We are restricted to deciding "actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue in the case before [us]." *Local No. 8-6, Oil, Chem. and Atomic Workers Int'l Union, AFL-CIO v. Missouri,* 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960) (internal quotation marks omitted).

There is no judgment we could issue here that could be effective. Even if we could enjoin the challenged policy now that it has been repealed, that is not the remedy the plaintiffs are currently seeking. In their stipulation, they have agreed that "with regard to the claim in the complaint that the defendant Student Association's policies for allocating mandatory student activity fee money to recognized student groups in effect on February 14, 2003 were unconstitutional on [their] face, the plaintiffs are entitled to an award of nominal damages in the amount of one dollar ($1.00) upon the [District] Court's determination set forth in the transcript of the Court's bench Decision." *See*

Stipulation of Settlement and Order, *College Standard Magazine v. Student Ass'n of the State Univ. of N.Y. at Albany*, No. 03 Civ. 0505 (N.D.N.Y. Mar. 30, 2005), Doc. No. 107 (Feb. 2, 2007). The district court's judgment, from which the plaintiffs have not cross-appealed, similarly reflects that the parties stipulated to an amount of damages in the total sum of $1.00, without any mention of an injunction. And we could not order damages for any harm the policy inflicted on the plaintiffs because the as-applied challenge has been conceded. Any declaration that the policy was unconstitutional would be strictly advisory. *Cf. Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) ("The real value of the judicial pronouncement-what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion-is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*") (emphasis in original).

In light of the repeal of the challenged policy and the concession as to the as-applied challenge, we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction over this appeal. *See, e.g., Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("appeal must be dismissed" as moot where court cannot grant " 'any effectual relief whatsoever' ") (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)); *see also Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir.1997) (referring to "general rule that legislative repeal of a statute renders a case moot"); *cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (upholding

justiciability of challenge to practice that City had voluntarily ceased but planned to reinstate).

The parties' failure to raise in their briefs the question of whether this appeal is moot for the foregoing reasons does not allow us to proceed despite the absence of a live case or controversy. "[W]e have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir.2006); *see also, e.g., Muhammad v. City of New York Dep't of Corr.*, 126 F.3d 119, 122-23 (2d Cir.1997) (mootness is an issue of subject matter jurisdiction).

For these reasons, the appeal is dismissed as moot and the judgment of the district court is vacated.[1] "It is well established that, when a matter becomes moot on appeal, federal appellate courts will generally vacate the lower court's judgment except where actions attributable to one of the parties rendered the appeal moot...." *Catanzano v. Wing*, 277 F.3d 99, 108 (2d Cir.2001) (internal quotation marks omitted). *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *see also Van Wie v. Pataki*, 267 F.3d 109, 115 (2d Cir.2001) (explaining that vacatur "avoids giving preclusive effect to a judgment never reviewed by an appellate court" (internal quotation marks omitted)). *Cf. Russman v. Bd. of Educ. of*

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[1] Because we vacate the judgment of the district court on the basis of the mootness of the appeal, we need not determine whether this case was moot while it was pending before the district court, which it may have been. See concurring opinion of Calabresi, *J.* If it was, of course, we would also be required to vacate the district court's decision for that independent reason.

Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 122 (2d Cir.2001) (noting exception to general rule of vacatur where "appellant has caused the mootness").[2]

CONCLUSION

For the foregoing reasons, the appeal is dismissed for want of jurisdiction, and the district court judgment is vacated. The case is remanded to the district court and the court is directed to dismiss the Verified Complaint as moot.

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[2] The actions of the appellant SA did not cause the mootness. The challenged policy had already been repealed before the district court ruled on the facial challenge. Following that ruling, the parties stipulated to the entry of summary judgment against the plaintiffs on the as-applied challenge, thus effectively agreeing that the plaintiffs had suffered no harm from the policy. *Cf. Russman*, 260 F.3d at 122 ("[W]hen the appellee has caused the case to become moot, we vacate the district court's judgment to prevent the appellee from insulating a favorable decision from appellate review.").

CALABRESI, Circuit Judge, concurring:

I agree with everything substantive in the *per curiam* opinion[1] and join it in full. I add a few lines because I think it is worthwhile to point out that this case was in fact moot at the district court level.

In Spring 2003, the defendant Student Association abolished the challenged funding policy. In September 2005, the district court granted the Plaintiffs' summary judgment motion as to liability. In October 2006, the parties entered into the stipulation that-we have held-caused this case to become moot. Then, in February 2007, final judgment was entered, and the Student Association timely appealed.

The event which led us to find that this case is moot happened between the district court's grant of summary judgment and the entry of final judgment below. I write to underscore that even after summary judgment has been granted, if, before the entry of final judgment, something occurs that causes a case to cease to be an Article III case or controversy, that action becomes moot and should be dismissed forthwith. This is so because the "case-or-controversy requirement subsists through all stages of federal judicial proceedings," *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (internal quotation marks omitted); *see also Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir.2001).

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[1] I would, however, for the sake of Latin, substitute "[*nostra*]" for "*sua* " in the quotation from *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir.2006), *ante*, at 35.

Moreover, the fact that the case was moot before the district court entered final judgment forecloses any possible claim by the Plaintiffs for attorneys' fees under 42 U.S.C. § 1988(b). "Whether [a plaintiff] can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 483, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990); *see also Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 454 (1st Cir.2009) (answering the question in the affirmative and collecting other cases doing the same). But that question cannot arise in this case. "Since the judgment below is vacated on the basis of an event that mooted the controversy before the [district court's] judgment issued, [the Plaintiffs were] not, at that stage, ... 'prevailing part[ies]' as [they] must be to recover fees under § 1988." *Lewis*, 494 U.S. at 483, 110 S.Ct. 1249.

(Excerpt of Transcript Containing Decision)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.* *Plaintiffs,* *-versus-* STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*, *Defendant.*	03-CV-505 (DECISION)

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of new York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on MONDAY, AUGUST 8, 2005, before the HON. THOMAS J. McAVOY, United States District Court Judge.

. . .

THE COURT: This case is back before the Court on a motion for reconsideration. Familiarity with the background and the prior decision in this case is assumed. Plaintiffs move for reconsideration on the ground that the Court did not address their argument that defendants' unwritten funding

policies are unconstitutional on their face. The defendants cross move for reconsideration on the ground that the Court failed to consider plaintiff's lack of evidentiary proof that the opinions of certain student association members may have tainted a majority of the voting student association members and that such taint led to the denial of funding.

Plaintiffs argue that the student association's unwritten funding policy is unconstitutional on its face because it gives the student association unbridled discretion and because defendants admitted having taken into consideration such factors as the number of active members in the organization and whether the organization was active on the campus and accessible to a wide group of students.

Although the student association did not have any written internal policies at the time plaintiffs applied for funding, it did have to work within the boundaries of 8 New York Rules and Regulations Section 302.14(c)(3). Thus, it did have some limitations. Nevertheless, the Court agrees with plaintiff that there is insufficient evident of adequate standards to avoid the problem of unbridled discretion. This Court adopts the reasoning in *Southworth v. Board of Regents of the University of Wisconsin*, 307 F. 3d 566, 578 and 579, wherein the Seventh Circuit held that a prohibition on unbridled discretion is an element of viewpoint neutrality. See also *Forsyth County Georgia v. The Nationalist Movement*, 12 S. Crt. 2395. The existence of unabridged discretion presents the risk that the decisionmaker – here, the student association – will use its broad discretion to favor or disfavor speech

based on its content. *Southworth* at 579. Although New York State regulations discussed above provide very broad categories of purposes for which funding may be allocated, it does not set out a mechanism for approving or disapproving funding requests or otherwise allocating funding among recognized student organization.

As mentioned in the Court's prior ruling from the bench, the defendants have admitted not having a written policy. To the extent that defendants did have standards, they admitted to using criteria such as the number of active members in the recognized student organization, whether the recognized student organization was active on campus, how accessible the recognized student organization was to students, and whether the recognized student organization was a small group who merely wanted money for a party. There's also evidence that defendants believed they could be denied funding for any reason at all.

Several of these written factors, however, can be related to speech or viewpoint. As the Seventh Circuit noted in *Southworth*, quote, the University cannot use the popularity of the speech as a factor in determining funding, close quote. *Southworth*, at 594. Thus, for example, looking to the number of active members in the recognized student organization can be seen as getting involved in issues concerning the popularity of a particular recognized student organization. Granting funding based on the number of students in the organization can be seen as treating minority viewpoints differently from majority viewpoints. While the number of students in the organization may in

certain circumstances be a legitimate factor in determining the amount of financing, see *Southworth*, 307 F. 3d at 595, it is not proper in determining whether to grant funding at all. The Seventh Circuit further noted in *Southworth* that, quote, consideration of the length of time in organization has been in existence and the amount of funding an organization has received in the past discriminates against less traditional viewpoints, end quote. *Southworth* at 594. The reasoning in *Southworth* equally applies here to consideration of the number of members in an organization and whether the recognized student organization is accessible to a wide range of students and how active the group was on campus. An organization with less popular viewpoints I unlikely to have many member, may not have the resources to be as active as more popular groups, and may be less known or less interesting to a wide range of students. Nonetheless, as noted, a group holding less popular viewpoints is not entitled to any less First Amendment protection than any other groups. Accordingly, the Court find that the largely unbridled discretion afforded the student association, coupled with the improper factors it used in its unwritten policy, were facially invalid.

Because plaintiffs raised the facial invalidity of the funding policies in their motion for summary judgment and the Court did not consider the facial validity of the funding policy in light of defendants' contentions concerning its claimed unwritten policy, plaintiff's motion for reconsideration is granted. Accepting defendants' facts as true, and assuming they did have such as unwritten policy, the student association's unwritten policy allows for too much

discretion. The student association's policy also takes into consideration factors that are improperly related to the content of the speech. Accordingly, plaintiff's motion for summary judgment must be granted. Because the Court finds the student association's funding policy to have been facially unconstitutional, the Court need not address defendants' motion for reconsideration. Accordingly, that motion is denied.

Plaintiffs shall submit an order on notice to defendants within 11 days of today's date.

(Court adjourned at 10:40 AM.)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiffs,

v.

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

AMENDED

Judgment in a Civil Case

Case No. 1:03-CV-505

__ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to plaintiffs' [11] Notice of Dismissal dated May 13, 2003, the complaint was voluntarily dismissed against defendant, State University of New York at Albany.

As to the plaintiffs' 42 U.S.C. § 1983 First Amendment right violations, the Court granted plaintiffs summary judgment against defendant, The Student Association of the State University of New York at Albany, finding that such student association funding policy was deemed unconstitutional in accordance with Senior Judge Thomas J. McAvoy's [90] Order dated September 3, 2005. The parties have stipulated to the amount of damages in the total sum of $1.00 as placed upon the record on October 11, 2006.

Dated: February 6, 2007

Lawrence K. Baerman
Clerk of Court

s/ C.M. Ligas
By: Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiffs,

v.

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

AMENDED

Judgment in a Civil Case

Case No. 1:03-CV-505

__ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the plaintiffs' [11] Notice of Dismissal dated May 13, 2003, the complaint was voluntarily dismissed against defendant, State University of New York at Albany.

As to the plaintiffs' 42 U.S.C. § 1983 First Amendment right violations, the Court granted

plaintiffs summary judgment against defendant, The Student Association of the State University of New York at Albany, finding that such student association funding policy was deemed unconstitutional in accordance with Senior Judge Thomas J. McAvoy's [82] Order dated July 9, 2005; however, the Court did not reach a decision as to the remaining cause of action relating to the discriminatory voting practices. The parties have stipulated to the amount of damages in the total sum of $1.00 as placed upon the record on October 11, 2006.

Dated: October 18, 2006

Lawrence K. Baerman
Clerk of Court

s/ C.M. Ligas
By: Deputy Clerk

UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Filed September 20, 2010

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand-ten,

_____x

Docket No. [s]: 07-0981-cv

College Standard Magazine, Jeffrey Scott Barea, and Julien A.M. Starr,

Plaintiffs-Appellees,

v.

Student Association of the State University of New York at Albany,

Defendant-Appellant.

_____x

Appellees College Standard Magazine, Jeffrey Scott Barea and Julien A.M. Starr filed a petition for panel rehearing, or in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition be denied.

FOR THE COURT:

s/Catherine O'Hagan Wolfe, Clerk of Court